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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 481.

ORMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, COMPOSING THE FIRM OF STREET & SMITH, *Appellants*,

vs.

HENRY C. PAYNE, *Postmaster General.*

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This appeal is from a decree of the Court of Appeals of the District of Columbia affirming a final decree of the supreme court of the District of Columbia, which dismissed the bill of complaint filed therein by appellants against appellee.

Appellants are publishers, and publish and issue, among others, certain periodical publications under the names The Magnet Library, The Arrow Library, The Columbia Library, The Undine Library, The Medal Library, The Eagle Series, The Bertha Clay Library, The Diamond Handbook Series, and the Eden Series (Record, p. 26).

Appellants' place of business from which said publications issue is 238 William street, in the city of New York, in the State of New York (Record, p. 3).

Prior to mailing same application was made through the postmaster of said city to the then Postmaster General for official determination of the class of mail matter to which the same belonged, and permission to enter and mail same at pound rate of postage.

All requirements precedent to such determination were observed and performed by appellants, and the then Postmaster General officially determined that each of said publications was entitled to be entered and mailed at the pound rate of postage as second-class matter, and appellants were officially notified by the postmaster of New York city of said official determination and accordingly given certificates of entry of publication as second-class matter for each of said publications.

The certificates above mentioned recited that they were valid while the character of the publications remained unchanged (Record, p. 3).

Thereafter appellants mailed all said publications in the post-office in said city of New York as such second-class matter until on or about the 4th day of November, 1901, when appellants were notified by the postmaster of said city of New York that the then Postmaster General had determined that all said publications were not entitled to be carried in the United States mail as second-class matter, and said several certificates were revoked and appellants were required to pay postage on said publications as third-class matter (Record, p. 3).

The character of said publications had remained unchanged, and the then Postmaster General did not revoke said certificates on the ground that the character of said publications had been changed, but on the ground that the former classification and certification as aforesaid of all said publications as second-class matter was erroneous and wrong, and that said publications constituted third-class matter.

Appellants at once protested against the said revocation and cancellation of said certificates and being required to

pay postage on said publications as third-class matter on which they had theretofore paid postage as second-class matter.

The then Postmaster General, notwithstanding said protests, refused to set aside said revocation and cancellation of said certificates and continued to demand payment on all said publications as third-class matter, which appellants paid.

Appellants thereupon filed bill of complaint, alleging, among other things, the facts contained in this statement, and asked that appellants be declared to be entitled to have each and every of said publications entered, received, and transmitted through the mails of the United States at second-class rates and as mailable matter at such rates, as prescribed by the act of Congress approved March 3, 1879, and that the trial court issue an injunction restraining the appellee, his agents and subordinates, from enforcing the cancellation of said several certificates of entry hereinbefore mentioned, and requiring said appellee to receive each and every of said publications for transmission, and to transmit the same through said mails as mailable matter of the second class and at second-class rates, in accordance with the provisions of said act of Congress, and also for a preliminary injunction, and that a writ of subpœna, directed to said appellee, should issue requiring him to answer this bill, but not under oath, his oath being expressly waived, and show cause why the prayers of this bill should not be granted, and for such other and further relief as under the facts stated and in the premises and in equity appellants show themselves entitled no receive.

Appellee made answer, issue was joined, and this case heard by the trial court upon bill and answer. Upon hearing, trial court passed a final decree denying all the prayers of appellants and dismissing their bill with costs.

Appeal was taken to the Court of Appeals of the District of Columbia, which affirmed the final decree of the trial court, and from such decree appeal is taken to this court.

ASSIGNMENT OF ERRORS.

It is respectfully submitted that in making the decree below the court erred as follows:

1.

The court below erred in affirming the decree of the trial court which denied the prayer of appellants that they be declared to be entitled to have each and every of said publications entered, received, and transmitted through the mails of the United States at second-class rates and as mailable matter at such rates as prescribed by the act of Congress approved March 3, 1879.

2.

In affirming the decree of the trial court which refused appellants a temporary injunction restraining the appellee, his agents and subordinates, from enforcing the cancellation of said several certificates of entry, and requiring said appellee to receive each and every of said publications for transmission, and to transmit the same through said mails as mailable matter of the second class, at second-class rates, in accordance with the provisions of said act of Congress.

3.

In affirming the decree of the trial court which refused appellants a permanent injunction restraining the appellee, his agents and subordinates, from enforcing the cancellation of said several certificates of entry, and requiring said appellee to receive each and every of said publications for transmission, and to transmit the same through said mails as mailable matter of the second class, at second-class rates, in accordance with the provisions of said act of Congress.

4.

In affirming the final decree of the court below, which dismissed appellants' bill of complaint with costs.

ARGUMENT.

I.

The Congress has sole and exclusive power over the entire postal system of the United States.

Congress has sole power over the entire postal system of the United States and exclusive power to regulate the same (*Ex parte* Jackson *vs.* U. S., 96 U. S., 727). Under the statute, the duties of the appellee are purely ministerial and executive. He may prescribe rules and regulations for the proper and orderly conduct of Department business, if not inconsistent with the law (R. S., 161), but he has no power to impose burdens and conditions not contemplated by the statute and additional thereto; hence his assumption to classify mail matter and designate it to be of one class or another, except as the same has been classified and designated by statute, is beyond his power and void.

Morrill *vs.* Jones, 106 U. S., 466.
Campbell *vs.* U. S., 107 U. S., 407.

Under the principles enunciated in these authorities the appellee, being an executive and administrative officer, has no power of legislation, but is simply clothed with authority to make proper and reasonable regulations for the conduct and regulation of postal business, but has no power, by his own interpretation of the statute, to add to the terms or take from the privileges afforded thereby. This, the appellants

claim, the appellee has done in the case at bar by arrogating to himself and assuming and exercising the right to classify mail matter according to his own ideas and in contravention of the express provisions of the statute.

II.

Publications involved in this litigation are second-class matter and are entitled to be classified and carried in the United States mail as such.

The appellants submit that their publications are mailable matter of the second class. Such matter is defined by the statute (act of March 3, 1879) as follows, so far as is essential to the case at bar:

"SEC. 7. * * *

Second. Periodical publications.

"SECTION TEN. That mailable matter of the second class shall embrace all newspapers and *other publications* which are issued at stated intervals and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen."

Section twelve has no bearing on this case.

"SECTION FOURTEEN. That the conditions upon which *a publication* shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted

to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers.

"*Provided, however*, That nothing herein contained shall be so construed as to admit to the second-class rate, regular publications designed primarily for advertising purposes or for free circulation, or for circulation at nominal rates."

The appellee, in his answer herein, admits that the publications of the appellants comply with the statutes in each and every one of these enumerated particulars, except that he alleges that they are literature rather than devoted to literature. In no other respect is he able to point out any variation from the requirements and definitions of this section of the statute. It is to be observed that so narrow a limitation as he and the learned Court of Appeals of the District of Columbia thus draw would exclude from second-class privileges any publication whatsoever, whether newspaper or monthly magazine, were the contents thereof sufficiently well written to entitle them to be called literary or were made up, as our Sunday newspapers largely are, of purely literary matter, such as poetry, fiction, etc. Nowhere does the appellee claim that the publications of the appellants do not disseminate information of a public character. Just what would be disseminating information would vary according to the circumstances and position in life of the reader, and what might not be such to many a well-educated person would be to an ignorant one. There being no positive ground of justification, therefore, under the plain provision of the statute for the exclusion of these publications, the appellee is forced to read into it his own language and then deduce therefrom his own arbitrary interpretation. In other words, he claims that to all books is denied such privilege, though the statute contains no such provision. But it is a "publication" that the statute declares to be second-class matter, provided it meets the statutory requirements, and the only distinction made as to books is not as to books in and of themselves, but solely as to the

manner of their binding—that is to say, any publication regularly issued as often as four times a year, dated, numbered consecutively, issued from a known office of publication, originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry, having a legitimate list of subscribers, and not designed primarily for advertising purposes or for free circulation at nominal rates, is, whether called a book or by any other name, entitled absolutely to transmission through the mails at second-class rates, provided, and provided only, that such publication is formed of printed paper sheets without board, cloth, leather, or other substantial binding such as distinguish *printed books for preservation* from periodical publications.

It is not the *contents* of the publication, but the *publication itself*, that is the subject of the statute, and it is immaterial what the contents may be so long as the publication complies with the statute. It was entirely competent for Congress to define and classify publications for postal purposes and to place books, if it saw proper, into different grades for such purposes, and it did so in this statute. The appellee has his own notion of what is or is not a book, and has exercised it to the extent of overruling this act of Congress, but what is a book?

"Webster: (1.) A collection of sheets of paper or similar material, blank, written or printed, bound together. (2.) A literary composition, written or printed; a treatise. (3.) A part or subdivision of a treatise or literary work; as the Fifth Book of Euclid; the Tenth Book of Paradise Lost. (4.) A volume or collection of sheets in which accounts are kept; a register of debts and credits, receipts and expenditures."

"Worcester: A printed literary composition consisting of several sheets of paper stitched together or bound; a work; a volume."

Under these standard authorities, every publication mentioned in section fourteen is a book; but the privileges of the section are only extended to such publications, in case of their being bound or fastened together, as therein directed and conforming to the statute in the other enumerated respects.

So far, then, as the statutory division of books is concerned, we have thus far had one particular kind of books, viz., those formed of printed paper sheets without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications.

The act of Congress then proceeds to define and classify matter of the third class as follows:

"SECTION SEVENTEEN. Mail matter of third class shall embrace books, transient newspapers and periodicals, circular and other matter wholly in print (not included in section twelve) proof sheets, corrected proof sheets, and manuscript copy accompanying the same."

Under a familiar rule as to the construction of statutes that all parts of a statute are to be taken together and the true intent of the statute gathered from the consideration of all its parts, the only possible meaning that can be given to books as used in this section is all kinds of books not provided for in section fourteen, viz., books substantially bound and not issued as a publication or part of a publication periodically and as otherwise specified in section fourteen. This construction of the statute not only gives force and meaning to all of its parts, but is in consonance with the evident intent of Congress, because it is a matter of familiar history that the purpose of Congress in making these classifications of mail matter was to encourage the publication of good literature at small cost—that is, cheap books, unbound books—so that they might be circulated through the mails at low rates of postage, and in this way the poorer and humbler of our citizens might be enabled to purchase them

and the general intelligence and culture of the country be increased thereby.

Other books, better printed and on better paper, substantially or expensively bound, would still be within the reach of persons of larger means if circulated through the mails as third-class matter.

All this has been brought out in numerous discussions of the subject that have been had in and before the Committee on Post-Offices and Post-Roads and in Congress itself from time to time.

It is to be noted also that section twelve of the statute refers to section fourteen as defining second-class matter, and as section seventeen is later than section fourteen, and declares that third-class matter shall comprise books not included in the former section, it necessarily follows that books of a certain kind must have been included therein.

III.

Predecessors of appellee have construed this statute as appellants contend it should be construed.

Predecessors of the Postmaster General having adopted the construction of the statute thus claimed by the appellants to be correct, and having issued to the appellants their certificates entitling their publications to admission to the mails at second-class rates, subsequent Postmasters General have no authority to revoke such certificates in which the only mention of duration of these certificates is as follows: "Valid while the character of the publications remains unchanged." It is not contended by anybody that the publications are in any respect different now from what they were when the certificates were issued, so that, assuming that the postmaster at New York had any power to insert such a condition in the certificate, such condition has not been violated, and there is no pre-

tense that the appellants have ever practiced any fraud upon the appellee or his subordinates. The rule is well settled that even in a case of doubtful construction the long-continued practice of a department will be held to establish for such a rule which will be enforced, and as was said in Brown *vs.* U. S., 113 U. S., 568:

"A contemporaneous and uniform interpretation by executive officers charged with the duty of acting under the statute is entitled to weight in its construction, and in the case of doubt, ought to turn the scale."

Other authorities to the same effect are:

U. S. *vs.* Richardson, 28 Fed. Rep., 61.
Packard *vs.* Richardson, 17 Mass., 144.
The Queen *vs.* Cutbush, 2 Q. B., 379.
U. S. *vs.* Philbrick, 128 U. S., 52.
Noble *vs.* Union River Logging R. Co., 147 U. S., 165.

In the latter case this court held that one Secretary of the Interior had no power to revoke an approval granted by his predecessor, and that such revocation is an attempt to deprive the grantee of his property without due process of law and is void. See also:

The Laura, 114 U. S., 411.
U. S. *vs.* Hill, 120 U. S., 169.

It is submitted, therefore, that the appellants having complied with all the provisions of the statute and the rules of the Post-Office Department, and having thus obtained their various certificates, and having on the faith of these established and conducted their business as publishers and expended large sums of money in reliance upon the good faith of the Government, as expressed in the action of its Postmaster General, the appellee cannot now legally deny to them the privileges granted and properly granted by his predecessors.

IV.

In the cancellation of said certificates appellants have been deprived of property rights by appellee without due process of law.

The appellants have been arbitrarily deprived of a property right by the cancellation of their certificates without due process of law. The appellee in his answer herein avers that this privilege is not a property right, but it is confidentially submitted that such proposition is without force. The mails of the United States were established for the use and benefit of all its citizens, and it requires but little reflection to see that every citizen has an absolute right to their use so long as he complies with existing laws respecting the same, and no postmaster or Postmaster General or the entire Post-Office Department has any authority whatsoever to discriminate against him in his free and full exercise of that right. The use of the mails is so important to the commerce of the country and the intercourse and enlightenment of its citizens that to impair it, or to discriminate in favor of one citizen against another in such exercise, would not only be subversive of business stability, but would be declared by the courts to be an arbitrary and unjustifiable usurpation of authority. That such use of the mails *is* a property right belonging to every citizen was held in Hoover *vs.* McChesney, 81 Fed. Rep., 472.

V.

Classifying the publications involved in this action as third-class matter and forcing appellants to pay postage on same as such are without the authority of appellee and are illegal and void.

The refusal of the appellee to permit the publications of the appellants to be transmitted through the mails at second-class rates and his insistence that the same should be paid for at the much higher rate exacted for third-class matter, being in contravention of the statute and not a matter left therein to his discretion, and being in contravention of the long-continued practice of the Post-Office Department, and being a cancellation of a valuable right of the appellants, were illegal and void.

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia herein should be reversed, and judgment for an injunction as prayed for in the bill of complaint should be directed to be granted with costs.

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MARCH, 1904.